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8
9 UNITED STATES DISTRICT COURT

10 DISTRICT OF ARIZONA

11 ARIZONA STATE DEPARTMENT OF
12 EDUCATION,

13 Plaintiff,

14 vs.

15 UNITED STATES DEPARTMENT OF
EDUCATION; MARGARET SPELLINGS,
16 in her capacity as Secretary of the United
17 States Department of Education,

18 Defendants.

No.

**COMPLAINT FOR
DECLARATORY JUDGMENT**

19
20 For its complaint against defendants, plaintiff alleges as follows:

- 21 1. This is a complaint for declaratory judgment under 28 U.S.C. § 2201 for the
22 purpose of determining a question of actual controversy between the parties, as more
23 fully set forth below.
- 24 2. This Court has jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1331.
- 25 3. Venue herein is proper pursuant to 28 U.S.C. § 1391(e) (2) because a substantial
26 part of the events or omissions giving rise to the claim occurred in this district, and

1 pursuant to 28 U.S.C. § 1391(e) (3) because the plaintiff is situated in this district and
2 the action involves no real property. Venue herein is also appropriate pursuant to 5
3 U.S.C. § 703 because there is no “special statutory review proceeding relevant to the
4 subject matter in a court specified by statute.”

5 4. Plaintiff Arizona State Department of Education (“ADE”) is an agency of the
6 State of Arizona charged with administering the State Plan under the No Child Left
7 Behind Act (“NCLBA”). 20 U.S.C. §6311.

8 5. Defendant United States Department of Education (“USED”) is an agency of the
9 United States of America charged with administering the NCLBA. Defendant Margaret
10 Spellings is the United States Secretary of Education and is charged with the
11 supervision and direction of the USED. 20 U.S.C.A. §3411. She is sued in her official
12 capacity as the United States Secretary of Education.

13 6. An actual substantial and justiciable controversy exists over the meaning of
14 “statistical or other substantive reasons” as that term is used in 20 U.S.C.A. §6316(b)
15 (2) (B), and over the scope of ADE’s authority under that provision.

16 **The NCLBA and Annual Yearly Progress (“AYP”)**

17 7. In 2001 Congress enacted the NCLBA, which amended the Elementary and
18 Secondary Education Act of 1965 (“ESEA”). Public Law 107-110 (2001).

19 8. Among other things, the NCLBA requires each state to determine annually that
20 public schools are making progress toward enabling all public elementary school and
21 secondary school students to meet Arizona’s student academic achievement standards.
22 This determination is referred to as Annual Yearly Progress (“AYP”). One of the
23 principal tools for determining the AYP of a school is an academic assessment of
24 students (the “Assessment”), which, in Arizona, is Arizona’s Instrument to Measure
25 Standards (“AIMS”). 20 U.S.C.A. §6311(b) (3) (A); 34 C.F.R. 200.6.
26

1 9. The Assessment is required to be given annually to all students, including
2 Limited English Proficient (“ELL”) students. 20 U.S.C.A. §6311(b) (3) (C). However,
3 ELLs may be given reasonable accommodations, which may include taking the test in
4 their native language. 20 U.S.C.A. §6311(b) (2) (A); 34 C.F.R. 200.6 (b).

5 10. A school that disagrees with its AYP classification/identification can provide
6 evidence that the classification is wrong:

7 If the principal of a school proposed for identification under paragraph
8 (1), (5) (A), (7), or (8) believes, or a majority of the parents of the students
9 enrolled in such school believe, that the proposed identification is in error
10 for statistical or other substantive reasons, the principal may provide
11 supporting evidence to the local educational agency, which shall consider
12 that evidence before making final determination.

13 20 U.S.C.A.A §6316(b) (2). This AYP identification can then be changed by ADE in
14 its discretion.

14 **Negotiation of the Arizona State Accountability Plan and Agreement on its Terms.**

15 11. A state that chooses to receive a grant under the ESEA (and the NCLBA) is
16 required to submit a State Accountability Plan (“State Plan”) setting forth how the state
17 intends to comply with the requirements of the federal law. 20 U.S.C.A. §6311.

18 12. In May of 2003, the Arizona Superintendent of Public Instruction, Thomas C.
19 Horne, on behalf of ADE, was engaged in negotiations with the USED over assessment
20 of ELLs in Arizona. In particular, the discussions centered around the fact that Arizona
21 law, enacted by a voter approved initiative in 2000, requires that all standardized
22 assessments be in English (A.R.S. §15-755, Laws 2000, Init. Meas., Prop. 203, § 3),
23 although, under the NCLBA, “native language testing . . . should be provided to the
24 extent that it is practicable.” 20 U.S.C.A. § 6311(b) (3) (C) (ix) (III).

25 13. The parties to the negotiations initially could not agree on how many years ELL
26 students would have to learn English before their scores counted against their schools

for purposes of determining AYP. The general policy of the federal government was to give one year latitude only, so that the score would count in the second year. However, Arizona was in a unique situation. First, Arizona has large numbers of ELL students in its schools. In states where the numbers are small, the scores of those students being counted as non-proficient can have no consequence because, for statistical purposes, there must be a certain number of students from a given subcategory at a given grade level and subject (referred to as the “n” number) before those scores would be permitted to count against a school. Second, Arizona law enacted by a majority of voters in 2000 prohibits it from testing students in their native language. In a number of other states, the language deficiency could be compensated for by testing the students in their native language.

14. The Arizona Constitution provides that the “Legislature shall not have the power to amend an initiative measure approved by a majority of the votes cast thereon . . . , unless the amending legislation furthers the purposes of such measure and at least three-fourths of the members of each House of the Legislature . . . vote to amend such measure.” Ariz. Const., Art. IV, Pt. 1, § 1.

15. After a period of deadlock, representatives of the USED offered a resolution which was agreed to by ADE. The terms of the agreement were that the general rule would be applied in the first round of recording the test scores of ELL students. However, a school that failed to make AYP could appeal that decision if there were a sufficient number of ELLs in their first three years in Arizona schools. The basis for the appeal would be that, while the scores would accurately reflect the students’ progress toward meeting the Arizona standards, which require demonstration of achievement in English, they may not reflect academic accountability measures for purposes of federal NCLBA requirements. Thus, ADE would be permitted in its discretion to grant all such appeals. This made Arizona’s entry into No Child Left Behind consistent with

1 Arizona's own accountability system on this issue, Arizona Learns, which gives a three-
2 year grace period for English language learners.

3 16. It was the expectation of both parties (the ADE and the USED) that this
4 agreement was a binding, permanent agreement between both parties and as much a part
5 of the agreement as the written parts of the agreement.

6 **The Scope of 20 U.S.C.A. § 6316(b) (2) (B).**

7 17. The purpose of requiring that a state conduct the Assessment is to show a
8 school's progress in closing academic achievement gaps between disadvantaged
9 students and other groups of students, as well as minority and non-minority students. 20
10 U.S.C.A. § 6301.

11 18. Congress recognized that assessment measures for determining AYP may be
12 invalid for statistical or substantive reasons when it enacted 20 U.S.C.A. §6316(b) (2)
13 (B).

14 19. By enacting 20 U.S.C.A. §6316(b) (2) (B), Congress also recognized the need to
15 allow states discretion in determining what assessment scores may be invalid for
16 statistical or substantive reasons.

17 20. A measure of academic achievement that is administered in a language in which
18 the student is not yet proficient may create scores that do not measure the type of
19 academic accountability measure addressed by the NCLBA.

20 21. ADE's interpretation of 20 U.S.C.A. §6316(b) (2) (B) is that it has the discretion
21 to exclude assessment scores of ELLs whose scores may not statistically reflect the type
22 of academic accountability measures with which NCLBA is concerned, including their
23 lack of English language proficiency. This interpretation is consistent with the
24 interpretation of the USED representatives who negotiated a resolution of the issue with
25 ADE.

22. ADE’s interpretation of 20 U.S.C.A. §6316(b) (2) (B) is consistent with 20 U.S.C.A. §6311(b) (2) (C) (ii), which requires that AYP be “defined by the State in a manner that . . . is statistically valid and reliable.

23. ADE’s interpretation of 20 U.S.C.A. §6316(b) (2) (B) is consistent with 20 U.S.C.A. §6311(b) (3) (C) (ix) (III), which requires that ELLs be assessed for AYP purposes “in a valid and reliable manner.”

24. ADE’s interpretation of 20 U.S.C.A. §6316(b) (2) (B) is consistent with statements made by former United States Secretary of Education Rod Paige, who has cited the need for “greater flexibility” in allowing states and local school districts to meet the accountability requirements of the NCLBA with respect to ELLs.

25. ADE’s interpretation of 20 U.S.C.A. §6316(b) (2) (B) is consistent with a policy adopted by USED in 2004 with respect to counting scores of former ELLs who have attained English proficiency. Specifically, that policy recognizes that, even after students exit the ELL subgroup status, “states may have difficulty demonstrating improvements on state assessments for these students.” “Secretary Paige Announces New Policies to Help English Language Learners,” <http://www.ed.gov/news/pressreleases/2004/02/02192004.html> (date of access, June 5, 2006).

USED Position

26. In April 2005, the USED issued a Title I Monitoring Report, which included the following finding related to ADE’s practice of allowing appeals based on the scores of ELL students:

Finding: The ADE permits school/districts to appeal the identification for improvement based on results from students tested with non-standard accommodations and limited English proficient (LEP) students served less than three years. This practice effectively removes these student scores completely from final determination for school improvement.

Citation: Section 1116(b)(2)(B) of the ESEA allows the principal or the majority of parents of a school proposed for identification for

improvement may provide supporting evidence if they believe the proposed identification is in error for statistical or other substantive reason.

Further action required: The ADE must cease the practice of allowing appeals on the basis of scores that result from students tested with non-standard accommodations or LEP students with less than three years of language education services. Furthermore, the ADE must implement testing practices that enhance the valid and reliable assessment of students with disabilities and English language learners so that non-standard accommodations and linguistic barriers are minimized. ADE must provide documentation to confirm that districts have been notified of these changes.

27. This finding is directly contrary to the agreement that was previously reached between ADE and USED, more particularly described above.

The Need for Immediate Relief

28. On July 31, 2006, ADE will designate which Arizona schools are failing to meet AYP, based on scores on AIMS exams administered in the 2005-2006 academic year. Schools have until August 11, 2006, to appeal the proposed identification for statistical or other substantive reasons. ADE will make a final decision on or before September 1, 2006.

29. If ADE continues to grant appeals of a school's AYP identification based on scores of ELLs who have been the ELL program for less than three years, ADE risks a determination by USED that its program does not comply with the law.

30. The federal government can require the State to refund all funds used improperly and in violation of the statutory restrictions on the use of those funds. 20 U.S.C. § 1234a. The federal government can also withhold future federal funding entirely as a result of the State's violation of those restrictions. 20 U.S.C. § 1234d. This possible loss of hundreds of millions of dollars in federal aid compels ADE to seek an immediate judicial determination on the meaning and scope of 20 U.S.C.A. § 6316(b) (2) (B).

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PRAYER FOR RELIEF

WHEREFORE, plaintiff requests that:

1. The Court enter a declaratory judgment that ADE has the discretion to consider the fact that ELL students in Arizona must be assessed in English in determining whether a proposed AYP identification is in error for statistical or other substantive reasons, and, within its proper discretion, to continue to grant appeals as it has been doing.
2. The court award plaintiff costs, and grant such other and further relief as may be proper.

TERRY GODDARD
Attorney General

By _____
Susan Plimpton Segal
Assistant Attorney General
Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on _____, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of _____, to the following CM/ECF registrants:

_____/s/ Susan Plimpton Segal